

**The Ohio Bar Association
Environmental Law Committee
Fifteenth Annual Ohio Environmental Law Seminar
Salt Creek State Park
Text of Overhead Presentation by Bertram C. Frey
Deputy Regional Counsel, U.S. EPA, Region 5:
Ohio Voluntary Cleanup Program
May 5, 2000**

The Ohio Environmental Protection Agency (“OEPA”) administers the Ohio voluntary cleanup program, the Voluntary Action Program (“VAP”)

- I. Background
- II. The Ohio VAP Process
- III. Ohio Cleanup Standards
- IV. Process Completion
- V. Evaluation of Six Baseline Criteria: Does Ohio meet them?
- VI. Ohio’s submission

I. Background

- Ohio enacted the VAP in September 1994.
- Unlike other states in Region 5, OEPA has not entered into a MOA with U.S. EPA regarding its voluntary action program.

II. The Ohio VAP Process

- the entity must first determine whether any of the following exclusions apply:
 - (1) site is on NPL;
 - (2) site contains an underground storage tank with a petroleum or hazardous substance;
 - (3) site has PCBs or PCB contaminated material;
 - (4) site contains an oil or gas well that requires remediation;
 - (5) site contains a solid or hazardous waste landfill that is subject to closure;
 - (6) site has an underground injection well that is subject to the SDWA Injection Control Program; or
 - (7) site is subject of a federal enforcement action which requires site assessment, removal, or remedial activities. (A site that is subject to state enforcement action is also ineligible unless the party demonstrates by sufficient evidence that the property was either being addressed by the voluntary cleanup prior to the enforcement action, or plans for promptly and effectively cleaning up the contamination are in place.)

- The voluntary process does not begin by submitting an application or work plan to the state; OEPA does not ordinarily become involved with a VAP site until a party requests a covenant not to sue.
- Typical Voluntary Process
 - (1) begins with a Phase I environmental assessment, to determine whether the site is contaminated by hazardous materials or petroleum. If present,
 - (2) the Phase II assessment gathers sampling data and other information to determine whether the applicable cleanup standards are met.
 - (3) If the work indicates that the concentrations of the chemicals exceeds the applicable standards, then the VAP participant must conduct remedial activities.

III. Ohio Cleanup Standards

- VAP participants must use certified laboratories for analysis of samples.
- In most cases, the applicable cleanup standards will be the generic numerical standards for soil and groundwater established by Ohio.

IV. Process Completion

- Once the process is complete, or there is a plan in place to achieve the applicable cleanup standards, the Certified Professional submits a No Further Action Letter (“NFA”) to OEPA with supporting documentation. A Certified Professional is an environmental consultant who meets the state licensing requirements.
- The NFA letter can also be submitted after the Phase I or Phase II assessment is completed, if no cleanup is necessary.
- OEPA must audit 25% of the NFA letters issued in a calendar year.
- Within 30 days of receiving the NFA letter, accompanying verifications, and the applicable fee, the State must issue a covenant not to sue, which releases VAP participant from all civil liability to the state except for claims of natural resource damages and for claims the state may have pursuant to Section 107 of CERCLA for cost recovery to the United States. If the voluntary action involves engineering controls, the covenant remains valid only as long as the applicable standards in the covenant are met.
- The NFA Letter and covenant not to sue are recorded with the county recorder in which the property is located, and can be transferred with the property.

V. Evaluation of Six Federal Baseline Criteria for Voluntary Cleanup Programs: Does Ohio meet them?

- a. Does the state provide opportunities for meaningful community involvement?
 - There is no community involvement in the Ohio VAP, unless a person needs to obtain a permit to implement the voluntary action.
- b. Does the state ensure that voluntary response actions are protective of human health and the environment.
 - Ohio has established generic cleanup standards, based on the intended future use of a site, for many chemicals. If multiple chemicals are present, the volunteer must insure that the cancer risk does not exceed one in 100,000. (1×10^{-5})
 - Groundwater in urban areas can be classified with an urban use designation, which allows for greater groundwater contamination.
- c. Does the state have adequate resources to ensure that voluntary actions are conducted in a timely manner?
 - The state's resources should not be a factor since the party conducting the audit does not need to involve the state until cleanup decisions are made.
 - The state must automatically issue a covenant not to sue, when provided as NFA letter and accompanying documentation by a Certified Professional.
- d. Does the state provide mechanisms for written approval of response action plans and a certification or documentation indicating the action is complete?
 - There are no mechanisms for State approval until the covenant not to sue is requested or alternatively if a party needs a permit to conduct a cleanup.
- e. Does the state provide adequate oversight?
 - The only oversight by the state come in the form of after-the-fact auditing of the NFA letters and reviewing requests for covenants not to sue.
 - Pursuant to Section 3746.17 of the Ohio Revised Code, OEPA must audit at least 25% of the NFA letters issued in a calendar year.
- f. Does the state have the capability, through enforcement or other authorities, of ensuring completion of the response action if the voluntary participant fails or refuses to complete the necessary action (including operation and maintenance)?
 - Instead of having a State Superfund law similar to CERCLA, Ohio uses a patchwork of water and hazardous waste laws for enforcement.

VI. On January 24, 2000, Ohio submitted a MOA application which the state believes addresses the site programmatic criteria. The application is being reviewed by EPA.